

# HOUSING POLICY COUNCIL

## THE FINANCIAL SERVICES ROUNDTABLE



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Federal Communications Commission  
445 12th Street, SW, Room 5-A866  
Washington, DC 20554

Re: CG Docket No. 05-338, Rules Implementing the Junk Fax Prevention Act of 2005

Dear Sir or Madam:

The Housing Policy Council of The Financial Services Roundtable appreciates the opportunity to comment on the regulations to implement the Junk Fax Prevention Act of 2005.

The Financial Services Roundtable formed the Housing Policy Council in 2003 because of the importance of mortgage finance issues to consumers, the economy, and the members of The Roundtable. The Housing Policy Council consists of twenty-two financial services firms that provide mortgage credit to consumers. We estimate that the member companies of the Housing Policy Council originate over 62 percent of the mortgages in the United States.

The members of the Housing Policy Council make extensive use of facsimile transmissions in transactions with consumers and other businesses. Thus, the Housing Policy Council welcomes the opportunity to clarify the operation and scope of the established business relationship ("EBR") exception to the Commission's regulations related to unsolicited facsimile advertisements.

### Business-to-Business Relationships

Our primary concern is the potential impact of the proposal on business-to-business relationships. Mortgage lenders routinely fax interest rate quotes, product information, and even compliance information to other businesses, especially mortgage brokers, who use such information with prospective borrowers. Excessive regulation of the EBR could impede this flow of information – to the detriment of borrowers.

It is not unusual for a secretary, a sales agent, or some other party associated with a mortgage broker to request rate quotes and other information to be provided by facsimile. Typically, the secretary, sales agent, or other party simply calls a lender and asks to be placed on a distribution list. We urge the Commission to avoid the imposition of a verification requirement on this process. Such a requirement would undoubtedly cause some brokers, especially smaller brokers, to fail to receive rate quotes or other information about lending programs.

One potential way to address business-to-business transmissions would be for the Commission to define what constitutes a “solicited facsimile.” Solicited facsimiles would not be subject to the notice and opt-out requirements of the regulation. Any such definition should be broad and flexible, in order to accommodate existing business practices. For example, a “solicited facsimile” could be defined as “a facsimile sent in response to a written or oral request by an employee, agent or representative of the recipient of the facsimile.”

Alternatively, the regulation could incorporate a presumption in favor of the creation of the EBR between sender and recipient, and not address the source or means by which the recipient’s facsimile number was obtained. As a result of the EBR, there may be any number of documents, applications, agreements and other communications exchanged between the parties. Any one or more of such documents may contain the recipient’s fax number. Additionally, the recipient’s facsimile number may be available through a third party or other public source. As long as the sender can establish a valid EBR, the Commission should not be concerned with the details of how the sender obtained the number.

Our goal is to ensure that business-to-business information will not be unduly affected by the regulation.

#### Refining the Opt-Out Request

We have found that some consumers prefer to receive some communications, but not all. Similarly, there are instances in which consumers or businesses seek to limit communications only for short periods of time. Therefore, we recommend that the opt-out notices give recipients the ability to tailor opt-out requests to their individual needs. This would permit, for example, a mortgage broker to opt-out of special promotions, but continue to receive rate information. It also would permit a recipient to provide that the opt-out expire at some point earlier than 5 years.

### Consistency with Telephone Solicitation Rule

We agree with the general principle that the parameters of the EBR in the facsimile solicitation rule should follow the parameters of the EBR in the existing telephone solicitation rule. In other words, the EBR should encompass a purchase or transaction during the past 18 months, and an application made during the prior 3 months. Furthermore, the regulation should incorporate any interpretations of the telephone solicitation rule. We note, for example, that the Commission has interpreted the EBR in the telephone solicitation rule to apply to all customers who maintain open accounts with a financial institution. A similar approach should be taken in this context.

### EBR's Formed Prior to July 9, 2005

Since there has been no requirement for institutions to maintain proof of when or how a facsimile number was obtained, we believe that senders would be unduly burdened by a requirement to establish such details after the fact. We recommend that the regulation include a presumption with respect to such pre-July 9, 2005 EBR's to the effect that the facsimile number was validly obtained as a result of the ongoing relationship, including a presumption that the sender possessed the number as of July 9, 2005.

### Impact of Opt-Out on EBR

Although we agree that a sender must comply with a recipient's request not to receive future unsolicited facsimiles, we believe that such a request should not terminate the EBR between the sender and the recipient. We urge the Commission to consider the EBR to be maintained and continuing, as long as the EBR definition is satisfied.

### Federal Preemption

We strongly urge the Commission to acknowledge that this regulation will "occupy the field" and, thereby, preempt any State laws or regulations that address the same subject matter.

A preemption provision would be reasonably based upon the intent of the Junk Fax Prevention Act of 2005. In passing that Act, Congress established an EBR standard for facsimile transmissions. To allow States to adopt conflicting standards would undermine the intent of the Act.

A preemption provision also may be justified under the terms of the Commerce Clause of the Constitution. The mortgage business in the United States is interstate commerce. All of our member companies serve customers located throughout the various States. Indeed, home ownership rates are at an all time high because consumers in every

region of the country have access to mortgage credit. State laws, no matter how well intended, should not be permitted to impede or impair this market.

A recently adopted California statute is a case in point. That statute does not recognize an EBR exception. This imposes additional costs upon lenders doing business in California, and reduces the flow of rate and other information to consumers in that State. A preemption provision would ensure that lenders could follow a single, uniform national standard regarding facsimile solicitations.

### Summary

In sum, the Housing Policy Council appreciates the opportunity to comment on the proposed regulation. We urge that it accommodate the free flow of information between business entities, possibly through a definition of the term "solicited facsimile." We also urge that the regulation include the preemption of State laws and regulations on the same topic and establish a single, uniform national standard regarding facsimile solicitations.

With best wishes,

A handwritten signature in cursive script that reads "John H. Dalton".

John H. Dalton  
President